UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Burnetta Miller Smith, Charging Party, v. Vera Lewis Irma L. Harris, Respondents.	HUDALJ 07-91-0055-1 Decided: August 27, 1992

Curtis C. Crawford, Esquire
For Respondents

Joseph James, Esquire
Lois Hoover, Esquire
For the Charging Party

Before: Samuel A. Chaitovitz
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed with the Department of Housing and Urban Development ("HUD") by Burnetta Miller Smith ("Complainant") alleging that Vera Lewis and Irma L. Harris ("Respondents") violated the Fair Housing Act, 42 U.S.C. 3601 et seq., as amended, ("Act" or the "Fair Housing Act") by discriminating against Complainant based on her race and familial status. The complaint was amended to allege that the discrimination was based solely on Complainant's familial status. HUD investigated the complaint and, after deciding there was reasonable cause to believe that discriminatory acts had taken place, on January 14, 1992, issued a Determination of Reasonable Cause and Charge of Discrimination ("Charge") against

the Respondents. The Charge alleges violation of sections 804(a), (b), and (c) of the Act (42 U.S.C. 3604(a), (b) and (c)). Respondents filed an answer denying they violated the Act.

A hearing was conducted before the undersigned on May 12, 1992, in St Louis, Missouri. At the close of the hearing the parties were ordered to submit post-hearing briefs by June 29, 1992. Pursuant to a request by all parties the time for filing briefs was extended to July 24, 1992. Briefs were timely filed.

Based upon the entire record, including my observation of the witnesses and their demeanor, and my evaluation of the evidence[1], I make the following:

Findings of Fact

1. On or about November 23, 1976, Complainant rented from Respondent Lewis, an apartment on the second floor of 4896-8 Farlin Avenue, St. Louis, Missouri (hereinafter the "Farlin property"). This is a brick building consisting of four apartments that are exactly the same in size and layout. (Tr.26, 53, 54,206).[2]

2. Respondent Lewis owned the Farlin property. Respondent Harris was the owner/broker of I. L. Harris & Associates Realty, a real estate agency, engaged by Respondent Lewis to manage the Farlin property in 1990. (Ct. 2,3;G.1; Tr. 218).

3. In 1976, when Complainant moved into the apartment described above, her family consisted of herself and a two year old son. On October 23, 1979, a second son was born to Complainant, and she and her two sons continued to reside in the unit leased from Respondent Lewis. (Tr. 26, 53-54, 57).

4. On May 10, 1989, Complainant married Sylvester Smith, who then moved in and resided with Complainant and her two sons in the subject apartment. (Tr. 53, 71, 100).

5. Sylvester Smith was in the business of supplying wooden skids, also called pallets, to various businesses. During July 1990, he had temporarily stored a number of skids on the ground at the rear of the Farlin property, where a garage had once stood. (Tr.71, 72, 127).

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[1] At the outset of the hearing, the undersigned issued an ORDER granting a Motion to Impose Sanctions previously filed by HUD.(Ct. 1). This Motion was granted because Respondents failed to respond appropriately to certain of HUD's Request for Admissions, Interrogatories, and Requests for the Production of Documents.

[2] The transcript of the hearing is cited as "Tr." followed by a page number. The Secretary's exhibits will be cited as "G" followed by the exhibit number; those of Respondents are cited as "R"; and those of the Court as "Ct." The HUD's brief will be referred to as "Sec. Br." followed by a page number and Respondents' brief will be referred to as "Resp. Br." followed by a page number.

6. On July 13, 1990, a city building inspector inspected the exterior of the Farlin property for code violations pursuant to an anonymous telephone complaint. (Tr. 125-126).

7. The city building inspector observed a number of building code violations involving exterior items, such as unsound porches, faulty columns supporting the porches, a cracked retaining wall, a fence in disrepair, mortar that needed pointing, a faulty downspout, and open storage of a washing machine and the pallets. (Tr. 127, R.1). The building inspector did no interior inspection of the Farlin property. (Tr. 145).

8. A few days after the inspection, Respondent Lewis was advised in writing of the code violations and was given thirty days to correct them. (Tr.128-127, 130-132).

9. By letter dated July 26, 1990, from I. L. Harris & Associates Realty, addressed to Sylvester Smith, the Complainant and her family were informed that effective August 1, 1990 I. L. Harris & Associates "has taken over management" of the Farlin property. The letter stated that it was a thirty day notice to "vacate" the property because of the many code violations noted on the property required extensive work to bring the "apartment" up to code and that commencing August 1, 1990, the monthly rent of $150 was to be paid at the I. L. Harris & Associates' office. It stated further that there would be a late fee of $10 after the 5th of the month, and that starting September 1, 1990, the rent would be $300 per month. (G.1).

10. Approximately thirty days after the initial inspection, the city building inspector reinspected the Farlin property and found that all of the code violations still existed. (Tr.132-133).

11. The building inspector spoke with Respondent Lewis and advised her that the violations had not been remedied. Respondent Lewis told the building inspector that the skids were the property of Sylvester Smith and that Respondent Lewis was not responsible for them. (Tr.133).

12. The building inspector notified Complainant orally, and confirmed in writing, that the storage of the skids was a code violation and that they had to be removed within thirty days. (Tr.72-73, 104, 133).

13. The skids were removed by Sylvester Smith soon after he was notified that they were stored in violation of the code, within the thirty day limit. (Tr. 104, 134).

14. The other code violations ended up in court and a building permit was taken out to repair the porch. (Tr. 135). These exterior violations were not caused by children damaging the property, but rather were caused by age and decay. (Tr. 136-137).

15. Prior to the building inspection, Sylvester Smith had parked his pickup truck behind the Farlin property, where a garage had stood. (Tr.102). After the building inspection, Respondent Lewis told Smith not to park in the rear of the Farlin property. (Tr.105). Smith complied with this request and began to park his truck on Farlin

Avenue across from the Farlin property. (Tr. 105-106). Respondent Lewis complained about parking the truck on the street, but it was lawful to park a truck on the street. (Tr. 106).

16. Upon receiving the July 26, 1990 letter from I. L. Harris and Associates, Complainant called Respondent Lewis, who stated she did not know anything about the notice. She requested to see a copy of the letter, and stated she would contact the real estate agent. Complainant then sent her son, with a copy of the July 26, 1990, letter to Respondent Lewis. (Tr. 34).

17. Respondent Lewis did not contact Complainant, so Complainant again called Respondent Lewis, who stated that she had not yet contacted the real estate agent, but she would and then would call Complainant. (Tr. 35).

18. A letter dated August 26, 1990, to Complainant and her husband from I. L. Harris & Associates Realty, advised the Smiths that this was a "second notice" regarding the payment of rent for August, that they were to pay their rent before the fifth of the month or pay a $10 late charge, that they had not received the rent, and that if I. L. Harris & Associates did not hear from the Smiths, legal action would be initiated for the past due rent and "possession of the property." (G. 2)

19. Complainant called Respondent Lewis and asked her about the August 26 letter. Respondent Lewis again asked Complainant to send Respondent Lewis a copy of the letter. Complainant did not, inviting Respondent Lewis to come to Complainant's apartment to read the letter. (Tr. 35).

20. Complainant called I. L. Harris & Associates and inquired about the letters. Complainant was advised by the real estate agency representative that they were only doing what they were told. Complainant explained that the first letter was sent to Sylvester Smith, but that he did not rent the apartment. The real estate agency representative repeated they only were doing what they were instructed. (Tr. 35).

21. Subsequently Complainant had several conversations with Respondent Lewis, during which Complainant asked why her rent was being raised and why they were ordered to vacate. (Tr 37-39). Respondent Lewis never stated why the rent was being raised. (Tr. 37).

22. During the above described conversations, Respondent Lewis told Complainant that she was ordered to vacate because Complainant had teenage children, "teenage children draw children" and Complainant's children were destructive. (Tr. 38, 39). Complainant protested that her children were not destructive and that she had a child when she moved in. Respondent Lewis stated that she just preferred not to have children in the building any longer. (Tr. 38, 39). Respondent Lewis said that Complainant's children were "sabotaging" the property. (Tr. 40).

23. Complainant complied with Respondents' demand that she pay $300 a month in rent. (Tr. 42). While Complainant and her family lived in the Farlin apartment,

Respondents made no improvements inside the apartment, but they did repair the plumbing. (Tr. 43, 215). Respondent Lewis did not repair a roof that, in 1989, started leaking into Complainant's apartment. (Tr. 61-62).

24. At the time Complainant's rent was raised from $150 to $300 per month, one other family with children had also been paying $300 per month. (Tr. 173-175). This latter family moved into an apartment that had been rehabilitated and the rent was $300 when the family moved in. (Tr. 197-198). The rent for the remaining two apartments, each occupied by a single individual, was raised from $150 to $200 per month. (Tr. 173-174, 200-202, G.4).

25. Respondent Lewis charged the families with children a higher rent than those without children because single persons do not do as much damage. Respondent Lewis had no proof Complainant's children did any damage. (Tr. 176-177).

26. I. L. Harris & Associates advised Complainant and Sylvester Smith by letter dated September 21, 1990, signed by Respondent Harris, that they had only paid $150 for the September rent and they were reminded that the rent was $300 per month and that they had been given a 30 day notice to vacate the apartment. (G. 3).

27. During Complainant's tenancy at the Farlin property she made substantial improvements to her apartment at her own expense. (Tr. 28, 56, 85-86). Complainant had painting, plastering and drywall work done in her apartment during 1989. (Tr. 61). She hired someone to do the work and paid $400 for the material alone. (Tr. 28, 56, 101-102).

28. Complainant complied with Respondents' demand that she pay $300 per month rent, and paid that amount until she moved. (Tr. 42-43).

29. Because she had been ordered to vacate the premises, Complainant located new accommodations and she and her family moved out of the Farlin property on March 17, 1991. (Tr. 43, G.8). Complainant gave Respondents 30 days written notice that she was moving because she "was evicted." (G. 8). Complainant had about $75 in expenses for the move to the new residence. (Tr. 46, 109).

30. At the new residence Complainant paid $450 per month in rent and had to put down a $900 deposit. (Tr. 45). Complainant also incurred new expenses of $10.50 per quarter for trash pickup and about $85.00 per quarter for water. (Tr. 45-46). She had to pay $37.00 to have the telephone transferred. (Tr. 46).

31. Complainant's new residence is 4 miles, each way, further from her job than was the Farlin property. (Tr. 46-47).

32. Complainant had lived in the Farlin apartment for about 14 years before she moved. She liked the neighborhood, knew everyone in the neighborhood, and was friendly with her neighbors. (Tr. 48). Her children's friends were all located in the neighborhood. (Tr.48). Complainant found the fact she was ordered to move distressing

and feared she would come home and find her possessions on the street. (Tr. 48, 50). She found the allegations that her children were destructive upsetting. (Tr.50).

33. Complainant's older son was a junior in high school at the time of the move and was a member of ROTC at his school. He planned to go into the military, hopefully with rank after graduating. The new school he had to enter because of the move did not offer ROTC and, because the new residence was in the county and no longer in the city, he could not be bussed to his old school.[3] (Tr.48-49). Complainant's older son found the situation very upsetting and it still bothered him at the time of the hearing. (Tr. 48-49).

34. Complainant testified that she spoke to her co-workers about the situation and they saw she was upset. (Tr.50). She also thought she had a nice relationship with Respondent Lewis over the years and she found this change of relationship upsetting. (Tr. 49-50, 51).

35. During her tenancy in the Farlin property Complainant occasionally fell behind in her rent payments. During 1978 she was admitted to the hospital and had an operation. As a result she fell four or five months behind in her rent payments, which she promptly paid upon receipt of her income tax refund. (Tr.47-48). Respondent Lewis was very understanding and accepted the payment. (Tr.48). On another occasion Complainant fell on the steps of the Farlin property on the way to work. Respondent Lewis paid Complainant's medical bills and forgave a month's rent. Complainant sought no other compensation from Respondent Lewis. (Tr. 51-52).

36. During the investigation of this matter, which included taking statements from the Respondents, the HUD investigator did not advise either Respondent of any right to counsel or of any right against self-incrimination. (Tr. 184, 227-228, 239-240).

37. Respondent Lewis stated to a HUD investigator that she gave Complainant the 30 day notice to vacate because of the extensive work needed to bring the apartment up to code. (Tr. 175). Respondent Harris advised the investigator that the reason for the notice to vacate was their receipt of a notice from a city inspector about the pallets and some outside damage to the unit. (Tr. 1193). Respondents did not claim that late payment of rent was a reason for ordering Complainant to vacate. (Tr. 196).

Discussion and Conclusions of Law

The Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers which operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. City of Black Jack,* 508 F.2d 1179, 1184

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[3]In its brief HUD alleges that the older son was unable to make the football team, and therefore he had trouble adjusting to his new school, and possibly lost a college scholarship.(Sec. Br.28-29). The brief made no reference to the record to support such findings, and I could find nothing in the record to support such findings.

(8th Cir.), *cert. denied,* 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams v. Mathews Co.,* 499 F.2d 819, 826 (8th Cir. 1974).

The Fair Housing Act was amended to prohibit, *inter alia,* housing practices that discriminate on the basis of familial status. 42 U.S.C. Secs 3601-19. In amending the Act Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and 50 percent of all rental units have policies restricting families with children in some way. *Id., citing* Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey,* Office of Policy Planning and Research, HUD (1980). The survey also revealed that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress recognized these problems and intended the 1988 amendments to the Fair Housing Act to remedy these problems for families with children.

The Fair Housing Act, 42 U.S.C. at 3604, in pertinent part, makes it unlawful for anyone:

> "(a) To refuse to . . . rent after the making of a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . familial status . . . .
>
> (b) To discriminate against any person in the terms conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . familial status . . . .
>
> (c) To make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the . . . rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . , or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of . . . familial status . . . that any dwelling is not available for . . . rent when such dwelling is in fact available."

The Fair Housing Act defines familial status, in pertinent part, as ". . . one or more individuals (who have not attained the age of 18 years) being domiciled with--(1) a

parent or another person having legal custody of such individual or individuals . . . ." *Id* at 3602(k); 24 CFR Sec. 100.20.

Subsequent to the passage of the Fair Housing Act HUD implemented regulations which set forth actions or conduct that are unlawful under the Act. 24 CFR Part 100. The actions and conduct proscribed by the regulations that are relevant to this matter include, imposing different rental charges for the rental of a dwelling upon any person because of familial status (24 CFR 100.60(b)(3)); using different qualification standards or rental standards because of familial status (*Id* at 100.60(b)(4)); evicting tenants because of their familial status (*Id* at 100.60(b)(5)); using different provisions in leases because of familial status (*Id* at 100.65(b)(1)); and expressing to prospective renters or any persons a preference for or limitation on any renter because of familial status (*Id* at 100.75(c)(2)).

In analyzing a case under the Fair Housing Act, direct evidence proving the alleged violation, if it constitutes a preponderance of the evidence, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.1990); *HUD v. Jarrard*, 2 Fair Housing-Fair Lending (P-H) para. 25,005 (HUDALJ Sept. 28, 1990). In the absence of sufficient direct evidence of discrimination, however, discrimination under the Fair Housing Act is proved using the same three part test used in employment discrimination cases under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (hereinafter *Blackwell II*).

Complainant and her family, including her sons who were both under 18 years of age at all times material, meet the "familial status" definition set forth in the Fair Housing Act, 42 U.S.C. 3402(k), and HUD Regulations, 24 CFR 100.20.

Respondent Lewis specifically told Complainant that she and her family were being ordered to vacate the Farlin property because Complainant's children had become teenagers, and, as teenagers, draw more teenagers. Respondent Lewis alleged that Complainant's children had damaged the property, which allegation Complainant denied to Respondent Lewis and, at the hearing, not one scintilla of evidence was offered herein to substantiate any allegation that Complainant's sons harmed the property or, in any way, were undesirable tenants.

Respondent Lewis determined the rent for the apartments. (Tr.174). Families with children paid $300 per month rent while single individuals in those identical units paid only $200 per month. Respondent Lewis justified this disparity in rents on the basis that children did damage to the property. However she had no proof that Complainant's children had done any such damage.

Thus Respondent Lewis determined to charge Complainant, and another family with children, a higher rent than renters without children, and had Complainant ordered to vacate the apartment because Complainant had children and Respondent Lewis felt children were destructive, without any proof that Complainant's sons had misbehaved or been destructive. This type of general prejudice that children are destructive and bad

tenants that results in discrimination in housing opportunities against families with children is the type of prejudice the Act is attempting to prevent.

In the first letter to Complainant the justification for instructing them to vacate the apartment, was the "many code violations received on the property and the extensive work needed to bring the apartment up to code." (G. 1) The record establishes that the only code violations cited were to the exterior of the building and not within Complainant's apartment. There is no proof that Complainant's family had to vacate in order for these exterior code violations to be remedied, and the record does not establish that any other tenants were asked to move so these code violations could be remedied. The city building inspector noted the code violations were the result of the age of the building and poor maintenance, not of children being destructive. Further, with respect to the outside storage of pallets, that code violation was remedied promptly by Sylvester Smith, and, to remedy it did not require the Complainant's family to move. The prompt removal of the skids stands in stark contrast to Respondents' failure to remedy the other code violations until there had been resort to the courts.

Respondent Lewis' statements to Complainant and to the HUD investigator are direct evidence that Complainant was charged $100 per month rent more than tenants without children and was ordered to vacate the Farlin property because of her familial status. Complainant's family was ordered to vacate because her children were now teenagers, and teenagers draw teenagers. Respondents' professed need to make repairs to cure code violations, was a mere pretext to conceal the actual discriminatory motive.[4] In these circumstances both Respondent Lewis and Respondent Harris are liable for the discriminatory conduct, Respondent Lewis because she determined the discriminatory policy and Respondent Harris because she carried the policy out as Respondent Lewis' agent. *See Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1530-1531 (7th Cir. 1990).

Accordingly, I conclude that Respondents violated section 3604(a) of the Fair Housing Act, by imposing different rental charges upon Complainant because of familial status and by evicting Complainant because of familial status. 24 CFR 100.60(b)(3), (4) and (5). I conclude that Respondents discriminated against Complainant in the terms and conditions of rental of a dwelling in violation of section 3604(b) of the Act by using different provisions in a lease, including rental charges, because of familial status. 24 CFR 100.65(b)(1). I conclude that Respondent Lewis made and published a notice or statement with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination based on familial status in violation of section 3604(c) of the Fair Housing Act by expressing to Complainant limitation on Complainant as a renter because of her familial status. 24 CFR 100.75(c)(2).

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[4]During the course of the hearing Respondents seemed to raise the failure of Complainant to pay rent as a justification for the notice to vacate. This reason was not urged in the Respondents' Brief and was specifically disavowed by Respondent Lewis in discussion with the HUD investigator. (Tr. 196). Accordingly I conclude failure to pay rent was not a motivation for ordering Complainant to vacate.

Respondents argue that they were denied Constitutional rights set forth in the Fifth Amendment, U.S. Const. amend. V. (Resp. Br. 4-6). Respondent relies on the fact that the HUD investigator did not advise the Respondents of their "right to legal counsel" or "their right against self incrimination" when interviewing and communicating with Respondents during the investigation of this matter. (Resp. Br. 5). The Fifth Amendment states, in pertinent part, "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life liberty or property without due process of law . . . ." U.S. Const. amend.V.

There is no dispute that while interviewing Respondents, taking their statements, and communicating with them over the telephone, the HUD investigator did not advise Respondents that they had a right against self-incrimination or a right to counsel.[5]

Respondents confuse the exercise of the right against self incrimination provided in the Fifth Amendment and the obligation of a law enforcement agency to advise a person of those rights. In the subject case, at no time have the Respondents sought to exercise their rights against self incrimination or to be represented by counsel, and consequently at no time were they denied such rights by the HUD investigator. In fact, at the hearing and during the pre-hearing proceedings, they were represented by counsel and voluntarily took the stand.

The right against self incrimination provided in the Fifth Amendment, refers to a criminal case. However, it has been recognized that this right can be exercised in any type of proceeding, if the testimony could incriminate the speaker in a future criminal proceeding. *See Lefkowitz v. Turley,* 414 U.S. 70, 38 L. Ed 2d 274 (1973); *Kastigar v. United States,* 406 U.S. 441, 32 L. Ed 2d 212 (1972); and *Re Gault,* 387 U.S. 1, 18 L. Ed 2d 527 (1967). In the subject case there has been no showing that the Respondents' statements to the HUD investigator would have incriminated them in any criminal case. Nor have Respondents demonstrated that, because the Act provides for imposition of a civil penalty, this proceeding is criminal in nature.[6] Determining whether a particularly defined penalty is civil or criminal for purposes of the Fifth Amendment is a matter of statutory construction to find whether the legislature expressly or impliedly indicated a preference for one label or other, and if civil is expressed, the Fifth Amendment is applicable only upon the clearest proof that the statutory scheme is so punitive in purpose or effect as to negate legislative intention. *Allen v. Illinois,* 478 U.S. 364, 18 L. Ed 2d 742 (1986); *United States v. Ward,* 448 U.S. 242, 65 L. Ed 2d 742 (1980).

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[5]While Respondent Lewis was engaged in giving a statement she advised the HUD investigator that had Respondent Lewis known the interview would be so lengthy she should have been told she could have had an attorney. The HUD investigator offered to stop so Respondent Lewis could get an attorney, but Respondent Lewis declined the offer and continued with the interview. (Tr. 188).

[6]Even if this were a criminal proceeding, the record does not establish that Respondents were in the custody of the HUD investigator or that they were compelled to provide any information. *See Berkemer v. McCarty,* 468 U.S. 420, 82 L. Ed 2d 317 (1984); *United States v. Authement,* 607 F 2d 1129 (5th Cir. 1979).

In a Fair Housing Act proceeding respondents are liable only for "actual damages suffered by the aggrieved person", injunctive and equitable relief and "a civil penalty". Fair Housing Act at 3612(g)(3). Thus Congress provided only for compensatory damages and a "civil penalty". Further, the purpose of the civil penalty was deterrence, not punishment. It was not punitive. *See* H.R. Rep. No. 711, 100th Cong., 2d Sess. 37, reprinted in 1988 U.S. Code Congr. and Admin. News, 2173, 2198.

Accordingly, I conclude the nature of the proceedings and penalties under the Fair Housing Act are civil, for the purposes of the Fifth Amendment, and Respondents were not entitled to a warning and were not denied any Fifth Amendment protection. *See United States v. Ward; United States v. Chu,* 779 F. 2d 356 (7th Cir. 1985).

Remedies

The fair Housing Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive and equitable relief" and the order "may, to vindicate the public interest, asses a civil penalty against the respondent." 42 U.S.C. 2612(g)(3).

Damages

The Fair Housing Act provides that relief may include actual damages suffered by Complainant. *Id* at 2612(g)(3). HUD, on behalf of the Complainant, has prayed for an award of damages in the amount of $7,419 to compensate the Complainant for actual economic loss. In this regard HUD set forth certain actual out-of-pocket expenses quite specifically; others were set forth with less specificity; and yet others were merely hinted at with no precise amounts mentioned; and then the total amount was requested.

Complainant is entitled to $400 she paid to repair the Farlin apartment during the year prior to being instructed to vacate because, after making the repairs, she was unable to enjoy them because of the unexpected order to vacate the apartment. Complainant is entitled to the $100 per month rent overcharge, the difference between the $300 per month rent she had to pay and the $200 per month paid by tenants without children, for the for the seven months she paid it prior to her move, for a total of $700.

Complainant is also entitled to $75 for moving expenses. Complainant is entitled to be reimbursed for the following expenses at her new home, which she would not have incurred had she not had to vacate her Farlin apartment, for the approximately fifteen month period from the time she vacated the Farlin apartment to the time of the hearing, trash collection at $10.50 a quarter for 5 quarters for a total of $52.50, water service at approximately $85 per quarter for 5 quarters for a total of $425, and a $37 charge to move the telephone.[7] Complainant is also entitled to $3,750 to compensate

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[7] Respondents offered no evidence to establish that Complainant paid for trash collection or water service at the Farlin property.

her for the difference, $250, she had to pay in monthly rent for her new dwelling and the proper rent she would have paid for the Farlin apartment, $450 minus $200, for fifteen months.[8] *See HUD v. Morgan,* 2 Fair Housing-Fair Lending (PH) para 25,008 (HUDALJ July 25, 1991). HUD also seeks reimbursement for the $900 deposit on Complainant's new dwelling but, because this is presumably refundable when the dwelling is vacated, she may not be compensated for it. Also, although the new dwelling is four miles farther from Complainant's job, there was no evidence of any increased cost incurred by Complainant. Accordingly, Complainant is awarded $5,439.50 to compensate her for actual out-of-pocket expenses resulting from Respondents' discrimination.

Complainant is also entitled to recover damages for intangible injuries such as embarrassment, humiliation, and emotional distress. *See, e.g., HUD v. Blackwell,* 2 Fair Housing-Fair Lending (P-H), para 25,001 at 25011 (HUDALJ Dec. 21,1989) (hereinafter *Blackwell I*), *aff'd* 908 F.2d 864 (11th Cir. 1990); *HUD v. Murphy,* 2 Fair Housing-Lending (P-H) para. 25,002 at 25055 (HUDALJ July 13, 1990); *See also Smith v. Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.,* 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P-N & S. Inc.,* 372 F. Supp. 658 (N.D. Ga. 1973); *HUD v. Jarrad,* at 25,091. Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof. *Blackwell II,* at 1872; *Murphy* at 25,055; *See also Marable v. Walker,* 704 F. 2d 1219,1220 (11th Cir. 1983). Because emotional injuries are by nature qualitative and difficult to quantify courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury. *See, e.g., Block v. R.H. Macy & Co.,* 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.* at 384; *Blackwell I* at 25,011; *Blackwell II* at 872-73. The amount awarded should make the victim whole. *See HUD v. Murphy* at 25,056; *Blackwell I* at 25,013.

HUD asks that Complainant be awarded damages in the amount of $4,000 for her inconvenience, $12,000 for emotional injury, and $4,000 for loss of housing opportunity.

Complainant testified that she was very upset and frustrated by having to uproot her family from the place they had all lived in happily for about fourteen years. (Tr. 48-49). She felt anxious whenever she left her house fearing that when she returned she would find her furniture on the street. (Tr. 50). She was so distressed that she talked about it at work and her fellow workers observed how distraught she was. (Tr. 50). Complainant was at times reduced to tears. (Tr. 109). She was additionally upset by the statements of Respondent Lewis that Complainant's children were destructive, which she knew was not the case. (Tr. 50). All this was even more justifiably upsetting because Complainant was extremely disappointed because she thought she and Respondent Lewis were friends and had such a nice relationship for 14 years. (Tr. 49, 51).

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[8] The record does not establish whether the new dwelling is more or less desirable and comfortable than the Farlin apartment. Accordingly it is assumed the dwellings are comparable.

My observation of Complainant's demeanor when she testified about the extent of her emotional distress over the subject events support her claim that she was indeed very upset by the events and suffered substantial emotional distress.

Complainant and her family were comfortably living in their Farlin apartment for fourteen years, apparently on good terms with their landlord, happy in the neighborhood, and pleased with the schools. Then, without warning, their rent was doubled and they were ordered to vacate the premises. Complainant faced the daunting task of uprooting her family, finding new housing, and enrolling her children in a new school. This unexpected turn of events, aside from emotional distress, caused Complainant great inconvenience and irritation. *See HUD v. Denton,* 2 Fair Housing-Fair Lending (P-H) para 25,014 at 25,205 (HUDALJ November 12, 1991), remanded for reconsideration on other grounds. Accordingly, Complainant is awarded $3,000 for emotional distress and inconvenience.

HUD requested an award for loss of housing opportunity, but failed to explain or justify this request or to state the considerations in this case that warranted such a recovery. In these circumstances no award is made for loss of housing opportunity.

Civil Penalty

To vindicate the public interest, the Fair Housing Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. 3612(g)(3)(A); 24 CFR 104.910(b)(3). HUD asks that a civil penalty of "at least" $5,000 be imposed in this case.

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> "The Committee intends these civil penalties are maximum, not minimum penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require" H.R. Rep. No. 711, 100th Cong., 2d Sess. 37, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2198.

There is no evidence that any of the Respondents have previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against any Respondent is $10,000. 42 USC 812 (g)(3)(A) and 24 CFR 104.910(b)(3)(i)(A).

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence. If they fail to do so a penalty may be imposed without consideration of their financial circumstances. *See HUD v. Jarrad* at 25,092; *Blackwell I* at 25,015. In the subject case there is relatively little evidence in the record concerning Respondents' financial circumstances. Respondent Lewis owns the Farlin property and another two family house on Farlin Avenue in which she lives. (G. 12). Respondent Harris had been a real estate agent and broker and now owns a cocktail lounge.(Tr. 205).

Respondent Lewis owned the Farlin property and set the policies which resulted in the discriminatory rent and the order to vacate concerning the Complainant. Respondent Lewis must be held responsible for her conduct and that of her agents that caused Complainant harm. Respondent Lewis only controlled four apartments and, although it is possible that she did not know, in the Fall of 1990, that it was unlawful under the Fair Housing Act to discriminate based on familial status, ignorance is no excuse and the record does not establish that she did not know. With respect to Respondent Harris, even if she did not know of the discriminatory intent and was merely following instructions, she is still culpable. A person who acts as a conduit for the discriminatory conduct of another is liable for the unlawful conduct. *See Village of Bellwood v. Dwivedi,* at 1530-1531.

As discussed above, Congress provided for the imposition of a civil penalty to deter the conduct proscribed by the Act. A sufficient civil penalty must be assessed to ensure that Respondents and others get the message that discrimination based on familial status is unlawful under the Fair Housing Act.

Taking all of the foregoing into consideration a civil penalty of $2,000 against Respondent Lewis and $1,500 against Respondent Harris are deemed appropriate and shall be imposed.

Injuctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and to protect the public interest in fair housing. 42 U.S.C. 3612(g)(3); *Blackwell II* at 875. The purposes of injunctive relief include eliminating the effects of past discrimination, preventing future discrimination, and positioning aggrieved persons, as close as possible, to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack.* The injunctive remedies provided herein will serve these purposes.

Order

1. Respondent Vera Lewis and Respondent Irma L. Harris are permanently enjoined from discriminating against Complainant Burnetta Miller Smith, any member of her family, and any tenant or prospective tenant, with respect to housing because of familial status, and from retaliating against or otherwise harassing Complainant or any

member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families with children, including charging families with children higher rents than families without children and ordering families with children to vacate their apartments, or any policy that prohibits or discourages people with children 18 years or younger from living in any rental real estate owned, operated, or managed by Respondents.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent common area in all the buildings in which they maintain, operate, or manage rental units.

4. Respondents shall institute internal record keeping procedures with respect to the operation of any buildings owned, operated, or managed by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents from the inspection of such records.

5. Respondents shall maintain for a period of three years from the date on which this Order becomes final:

a. Records and applications of all tenants and applicants for rental units, setting forth their names, addresses, race, color, sex, religion, handicap, national origin, and familial status.

b. A list of all people who inquired about renting an apartment, including their names, addresses, race, color, sex, religion, handicap, national origin, and familial status.

6. Within ten days of the date upon which this Order becomes final, Respondents shall pay actual damages to Complainant Burnetta Miller Smith as follows: $5,439.50 for out-of-pocket expenses and $3,000 for emotional injury and inconvenience.

7. Within ten days of the date upon which this Order becomes final, Respondent Vera Lewis shall pay a civil penalty of $2,000 to the Secretary of HUD.

8. Within ten days of the date upon which this Order becomes final, Respondent Irma L. Harris shall pay a civil penalty of $1,500 to the Secretary of HUD.

9. Within 15 days of the date upon which this Order becomes final Respondents shall submit a report to HUD's Kansas City Regional Office of Fair Housing and Equal Opportunity, that sets forth the steps taken to comply with this Order.

This Order is entered pursuant to 42 U.S.C. 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge